No. 76-1286

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN L. SWEET,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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INDEX

PAGE

Opinion Below 2

Jurisdiction 2

Question Presented 2

Constitutional Provision and Statute Involved 2

Statement of the Case 3

Reasons for Granting the Writ 4

The decision below raises an important question respecting Congress' power under the commerce clause to extend federal criminal jurisdiction to encompass conduct having only local impact 4

Conclusion 7

Appendix A—Opinion of the United States Court of Appeals for the Seventh Circuit entered January 17, 1977 ..... App. 1

Appendix B—Order denying Petition for Rehearing dated February 16, 1977 ..... App. 14

AUTHORITIES CITED

Cases

Katzenbach v. McClung, 379 U.S. 294 (1964) 6

NLRB v. Reliance Fuel Corp., 83 S.Ct. 312, 371 U.S. 224, 9 L.Ed.2d 279 (1963) 4

Perez v. United States, 402 U.S. 146 (1971) 5

United States v. Keen, 508 F.2d 986 (1975) 4

United States v. Women's Sportswear Ass'n., 336 U.S. 460 (1949) 6

PAGE

United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942) 6

Wickard v. Filburn, 317 U.S. 111 (1942) 6

Other Authorities

House Rep. No. 91-1549, 1970 U.S. Code Cong. & Adm. News, pp. 4046-4047 4

House Rep. No. 91-1549, 1970 U.S. Code Cong. & Adm. News, p. 4013 6

Ill.Rev.Stat., 1975, c. 38, pars. 20-1 and 20-2 6

Title 18, U.S.C. §844(i) 2, 3, 4, 5

In the Supreme Court of the United States

OCTOBER TERM, 1976

No.

JOHN L. SWEET,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To: The Honorable, the Chief Justice of the United States and Associate Justices of the Supreme Court of the United States.

Petitioner, John L. Sweet, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Seventh Circuit, entered January 17, 1977, affirming a judgment of conviction against him entered by the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION BELOW

The Opinion of the United States Court of Appeals entered January 17, 1977, has not yet been reported, but is reprinted in full as Appendix A to this Petition.

JURISDICTION

The Judgment of the Court of Appeals was entered January 17, 1977, and petitioner's timely Petition for Rehearing was denied February 16, 1977 (See Appendix B, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1).

QUESTION PRESENTED

Whether 18 U.S.C., §844(i), as applied on the facts of this case, is a proper exercise of the power of Congress under the Commerce Clause of the Constitution, where the impact of the prohibited conduct is entirely local?

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

Constitution of the United States, Art. I, §8, cl. 3:

> The Congress shall have Power • • •
> To regulate Commerce with foreign Nations, and among the several States, • • • .

Title 18, United States Code, §844(i):

> (i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.
>
> —84 Stat. 958 (1970).

STATEMENT OF THE CASE

Petitioner was found guilty by a jury of conspiracy to violate 18 U.S.C., §844(i), and was sentenced to a term of imprisonment by the United States District Court for the Northern District of Illinois.[1] The Court of Appeals for the Seventh Circuit affirmed the conviction (See App. A, *infra.*).

The evidence, which is accurately summarized in the Opinion of the Court of Appeals, was sufficient to support the jury's verdict that petitioner had agreed with his co-defendants to firebomb a tavern which competed with one operated by petitioner and that the co-defendants carried out the agreement by setting the premises afire with bombs made of bottles, gasoline and railroad flares.

To sustain the burden of proving the interstate commerce aspect of the case the government called representatives of two firms which had supplied alcoholic beverages to the tavern bombed by co-defendants. Both testified that they received the beverages from outside Illinois at their business premises in Illinois, stored them for a period, then delivered the beverages to their customers in Illinois (Tr. 490-491; 499; 589-592). This testimony was the only evidence of any interstate aspect of the competing tavern business. The evidence also showed that all of the activities of defendants were confined to Illinois. There was no evidence that the materials constituting the bombs had moved in interstate or foreign commerce.

---

[1] The jury acquitted petitioner of a substantive violation of section 844(i). The two co-defendants were convicted of the conspiracy and of substantive offenses.

REASONS FOR GRANTING THE WRIT

The decision below raises an important question respecting Congress' power under the commerce clause to extend federal criminal jurisdiction to encompass conduct having only local impact.

The Court of Appeals sustained §844(i), as applied in this case, as a valid exercise of the commerce power. It is the first and, thus far, the only decision to consider §844(i) in a context where the interstate impact of the defendant's conduct was so minimal as to put the case at or beyond the frontier of the commerce power.[2]

The decision of the Court of Appeals gave an expansive interpretation to an enactment intended to exercise the full range of the commerce power. See House Rep. No. 91-1549, 1970 U.S. Code Cong. & Adm. News, pp. 4046-4047:

> Section 844(i) proscribes the malicious damaging or destroying, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce. Attempts would also be covered. Since the term affecting [interstate or foreign] "commerce" represents "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause." *NLRB* v. *Reliance Fuel Corp.*, 83 S.Ct. 312, 371 U.S. 224, 226, 9 L.Ed.2d 279 (1963), this is a very broad provision covering substantially

[2] The Ninth Circuit has sustained the statute against a commerce power challenge in United States v. Keen, 508 F.2d 986, 990 (1975), cert. den. 421 U.S. 929. That case involved the destruction of a fishing boat actually used in interstate commerce. Under those circumstances the effect on commerce unquestionably was substantial, and Keen therefore is plainly correct on its facts.

> all business property. While this provision is broad, the committee believes that there is no question that it is a permissible exercise of Congress authority to regulate and to protect interstate and foreign commerce. Numerous other Federal statutes use similar language and have been constitutionally sustained in the courts. See, Labor Management Relations Act, 29 U.S.C. 141 et seq.; Labor Management Reporting and Disclosure Act, 29 U.S.C. 401 et seq.; Civil Rights Act of 1964 (equal employment opportunity provisions), 42 U.S.C. 2000 et seq.; Consumer Credit Protection Act (truth in lending provisions), 15 U.S.C. 1601, et seq. and (loan sharking provisions), 18 U.S.C. 891 et seq.

While the decisions of this Court have extended the commerce power a long way, they have done so on facts markedly different from those involved in the instant case, and they have stopped far short of recognizing the plenary federal control over crimes against "business property" claimed in the House Report cited above.

The case closest to the present situation is *Perez* v. *United States*, 402 U.S. 146 (1971), in which this Court upheld the power of Congress to proscribe an entire class of business activity, "loan-sharking." But *Perez* turned largely on legislative findings that the loan-sharking business was of national proportions and that it was not controllable at the State or local level. There were no such findings respecting §844(i). The Court of Appeals acknowledged this important difference, but then cited a portion of the House Report referring to an "absence of any effective State or local controls" (App. 4). This language in the House Report is not directed specifically at §844(i); it speaks to Title XI of the Organized Crime Control Act of 1970 as a whole, which undertakes a comprehensive scheme of regulation of the traffic in explosives. In the context of the House Report, it is clear that the deficiency

in state laws referred to is associated with the manufacture and distribution of explosives, for it is stated three paragraphs further on in the Report that "* * * approximately 35 States have little or no regulation over the sale or distribution of dynamite and other explosive substances." House Rep. No. 91-1549, 1970 U.S. Code Cong. & Adm. News, p. 4013.

Whatever may be the situation respecting distribution of explosives, the legislative finding cited by the Court of Appeals does not bring the crime of arson within *Perez*. The facts of this case illustrate the distinction. The target of the attack was an individually-owned local business which dealt in goods obtained in Illinois. The incendiary devices were not shown to have moved in interstate commerce. Defendants all were local people, and there is not the slightest basis to associate any of these defendants with organized crime or any other form of ongoing or widespread illegal activity. Nothing indicates that Illinois law enforcement agencies were impotent to investigate and prosecute violations of the statutes on arson and possession of explosives (Ill.Rev.Stat., 1975, c. 38, pars. 20-1 and 20-2).

The Court of Appeals relied upon four other decisions of this Court.[3] All of these uphold the power of Congress to regulate intrastate business activity having substantial impact on interstate commerce, and two of them (*Wickard* v. *Filburn* and *Katzenbach* v. *McClung*) recognize specifically that the impact on commerce need not be very great to be "substantial." But they do not hold or suggest that

[3] United States v. Wrightwood Dairy Co., 315 U.S. 110 (1942); Wickard v. Filburn, 317 U.S. 111 (1942); United States v. Women's Sportswear Ass'n, 336 U.S. 460 (1949); Katzenbach v. McClung, 379 U.S. 294 (1964).

the acts of persons such as petitioner can become subjects of federal criminal prosecution simply because they have committed a State offense against property used in a local small business which happens to vend goods which originated outside the state, though supplied directly by a local source.

It is clear, then, that the decision below goes far beyond the prior holdings of this Court and, we submit, it is equally clear that its reasoning can be extended readily to support federal intervention in and control over virtually any subject of criminal activity on which the States presently legislate. If the commerce power is to extend so far, we respectfully submit that such extension should have the authority, certainty and uniformity which can derive only from the decisions of this Court. If, on the other hand, the Commerce power has been overextended in this case. it is most appropriate that this Court so inform the Congress and the prosecuting authorities, that they might guide themselves accordingly. In either case, we respectfully submit that the case is appropriate for review by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 76-1366, 76-1379, 76-1387

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

JOHN L. SWEET, HENRY D. HOLLOWELL and JAMES C. HOGAN,

Defendants-Appellants.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
No. 75-Cr-529—Thomas R. McMillen, *Judge.*

ARGUED NOVEMBER 30, 1976 — DECIDED JANUARY 17, 1977

Before FAIRCHILD, *Chief Judge,* CASTLE, *Senior Circuit Judge,* and WOOD, *Circuit Judge.*

Wood, *Circuit Judge*. The major issue is whether Congress in enacting 18 U.S.C. § 844(i)[1] has exceeded its permissible reach into local matters under the Commerce Clause of the Constitution of the United States as applied to the facts of this case. We think not.

On August 28, 1975, the defendants, John L. Sweet, Henry D. Hollowell and James C. Hogan, were charged in a four count indictment with conspiring to destroy a tavern and its contents (Count I); Hollowell and Hogan with unlawful making and possession of fire bombs (Counts II and III); and all three defendants with malicious destruction of a tavern by means of an explosive (Count IV), in violation of 18 U.S.C. §§ 371 and 844(i) and 26 U.S.C. § 5861(d) and (f). The jury found all three defendants guilty of Count I, Hollowell and Hogan guilty of Counts II, III and IV. Sweet was acquitted on Count IV.[2]

The factual background may be briefly stated. Two competing taverns, Uncle John's Country Inn, owned by Sweet, and Saso's Lounge, were located across the street

[1] 18 U.S.C. § 844(i) provides in part:

(i) Whoever maliciously damages or attempts to damage or destroy, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not more than ten years or fined not more than $10,000, or both; and if personal injury results shall be imprisoned for not more than twenty years or fined not more than $20,000, or both; and if death results shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment as provided in section 34 of this title.

[2] Sweet was sentenced to a period of four years; Hollowell to five years on both Counts I and IV to run consecutively, followed by three years probation to run concurrently on Counts II and III; Hogan to three years on both Counts I and IV to run consecutively, followed by three years probation on Counts II and III to run consecutively.

from each other in Godley, Illinois. Sweet offered $2,000 to eliminate his competition by dynamite and Hollowell and Hogan accepted the offer. By a combination of whiskey bottles filled with gasoline, railroad flares and bricks, Hollowell and Hogan bombed and burned Saso's out of business on April 15, 1976. Lost with the tavern building were its stocks of liquor and beer originating out of state but purchased locally through distributors.

I.

Defendants do not challenge the proof of the conspiracy or sufficiency of the evidence, but argue that the substantive statute § 844(i) as applied to this affair between two local taverns is beyond the power of Congress and thus, the convictions on Counts I and IV must fall.

It is conceded that the destroyed building and alcoholic beverages were not "used in interstate or foreign commerce," but the question raised by defendants is whether the property was used in an activity "affecting" interstate commerce within the terms of the statute. Defendants say that the use of the commerce clause by the federal government as an inroad into local matters has already gone as far as it can or should go.

Only one case has directly sustained the validity of § 844(i) under the commerce clause, but defendants argue that it is not in point because of factual distinctions. There the property bombed was a commercial fishing boat which shipped its catch interstate and was thus, the defendants argue, itself an instrumentality of interstate commerce. *United States* v. *Keen*, 508 F.2d 986 (9th Cir. 1974), *cert. denied*, 421 U.S. 929. That case relied on *Perez* v. *United States*, 402 U.S. 146 (1971), which to some extent the Government relies on here.

In *Perez, supra*, the contention was likewise made that the statute, 18 U.S.C. § 891, *et seq.*, was unconstitutional

on grounds that Congress had no power under the commerce clause to control local loan sharking as an activity affecting interstate commerce. That court had the benefit of congressional findings set forth in the act to the effect that there was a tie-in between local loan sharks and interstate crime. We do not have the benefit of such findings. However, the congressional purpose of Title XI, § 844(i), is explained in the following excerpts from the legislative history, House Report No. 91-1549, Organized Crime Control Act of 1970, 1970 U.S. Code Cong. & Ad. News:

> Bombings and the threat of bombings have become an ugly, recurrent incident of life in cities and on campuses throughout our Nation. The absence of any effective State or local controls clearly attest to the urgent need to enact strengthened Federal regulations of explosives.
>
> • • •
>
> Its purpose is to protect interstate and foreign commerce against interference and interruption by reducing the hazards to persons and property arising from explosives misuse and unsafe or insecure storage. It is also intended to assist the States effectively to regulate explosives distribution within their borders. . . . (P. 4013)
>
> • • •
>
> Section 844(i) proscribes the malicious damaging or destroying, by means of an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce. Attempts would also be covered. Since the term affecting [interstate or foreign] "commerce" represents "the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause," *NLRB* v. *Reliance Fuel Corp.*, 83 S.Ct. 312, 371 U.S. 224, 226, 9 L.Ed.2d 279 (1963), this is a very broad provision covering substantially all business property. While this provision is broad, the committee believes that there is no

> question that it is a permissible exercise of Congress authority to regulate and to protect interstate and foreign commerce. (P. 4046)

The long reach of the enactment into matters which in some other context might be regarded as local was obviously intended, but we do not believe the Congress has overreached its power.

> The commerce power is not confined in its exercise to the regulation of commerce among the states. It extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce. *United States* v. *Wrightwood Dairy Co.*, 315 U.S. 110, 119 (1942).

Holding that wheat grown only for home consumption and never marketed interstate was subject to federal regulation because it supplied the need of the producer, which need would otherwise have been satisfied by purchases in the open market, the Court said:

> But even if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, ... *Wickard* v. *Filburn*, 317 U.S. 111, 125 (1942).

The reach of § 844(i) in this case is not that far, but by analogy it could apply to a tavern bombing even though the alcoholic beverages served had not only been served but produced on the local premises.

In a civil rights case involving a local restaurant serving food, some of which had moved interstate, the Court again said:

> It goes without saying that, viewed in isolation, the volume of food purchased by Ollie's Barbecue from sources supplied from out of state was insignificant

when compared with the total foodstuffs moving in commerce. But, as our late Brother Jackson said for the Court in *Wickard* v. *Filburn,* 317 U.S. 111 (1942):

> "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." At 127-128.

Katzenbach v. *McClung,* 379 U.S. 294, 300-1 (1964).

In a Sherman Act case the Court summed up the problem and its answer:

> The trial court appears to have dismissed the case chiefly on the ground that the accused Asociation and its members were not themselves engaged in interstate commerce. This may or may not be the nature of their operation considered alone, but it does not matter. Restraints, to be effective, do not have to be applied all along the line of movement of interstate commerce. The source of the restraint may be intrastate, as the making of a contract or combination usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze. *United States* v. *Women's Sportswear Ass'n,* 336 U.S. 460, 464 (1949).

Recent Hobbs Act[3] decisions of this circuit are also

[3] 18 U.S.C. § 1951 (Hobbs Act) provides in part:

(a) Whoever in any way or degree obstructs, delays, *or affects commerce* or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both. (Emphasis added.)

helpful. See *United States* v. *Staszcuk,* 517 F.2d 53 (7th Cir. *en banc* 1975), *cert. denied,* 423 U.S. 837; *United States* v. *Braasch,* 505 F.2d 139 (7th Cir. 1974), *cert. denied,* 421 U.S. 910; *United States* v. *Gill,* 490 F.2d 233 (7th Cir. 1973), *cert. denied,* 417 U.S. 968. In *United States* v. *DeMet,* 486 F.2d 816 (7th Cir. 1973), *cert. denied,* 416 U.S. 969 (1974), this court considered the application of the Hobbs Act to extortion by police officers from the owner of a cocktail lounge, where, as in the present case, some of the alcoholic beverages had moved interstate. The court in upholding the use of that Act in those circumstances stated that "Because Congress has seen fit to exercise its full power under the commerce clause, extortionate conduct having an arguably *de minimis* effect on commerce may nevertheless be punished." The defendants seek to avoid these cases by arguing that they focus on whether the extortion interfered with commerce as distinguished from affecting interstate commerce. Both statutes punish unlawful acts which affect commerce. The effect on commerce was the concern of *DeMet.* In holding as we do, we are, therefore, not stretching federal jurisdiction as defendants argue. Any stretching that there may have been in this area was long ago accomplished. Nor do we discount the wisdom of some restraint succinctly enunciated in Mr. Justice Stewart's dissent in *Perez, supra.*

The punishment in § 844(i) of the unlawful use of explosives in an intrastate activity, but which has an effect on interstate commerce although *de minimis,* is within the power of Congress to enact as an appropriate means to accomplish a legitimate end under the commerce power.

II.

The remaining issues raised by the defendants will be briefly considered individually.

Relying on an instruction approved in *United States* v. *Hyde,* 448 F.2d 815 (5th Cir. 1971), cert. denied, 404 U.S. 1058,[4] to illustrate the claimed weaknesses of the instruction given in this case, the defendants argue that the court in effect directed a verdict for the Government on the commerce issue.[5] The defendants recognize that it is a function of the court to determine as a jurisdictional matter whether or not interstate commerce has been affected, if the jury finds the underlying facts to have been established. *United States* v. *Kuta,* 518 F.2d 947 (7th Cir. 1975), cert. denied, 423 U.S. 1014.

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[4] The court in *Hyde,* a Hobbs Act case, instructed in part:

> As to Count Four, I charge you that if you find one or more of the defendants named in this count to be guilty from the evidence presented to you, beyond a reasonable doubt, the Court has found, as a matter of law, that the evidence in connection with Count Four, if believed, meets the requirements of Title 18, Section 1951, United States Code, insofar as the conduct of the defendants having affected interstate commerce, and thereby sustaining the Court's jurisdiction within the scope of the Hobbs Act.

[5] The instruction given in the present case is:

> "Interstate or foreign commerce" means commerce between any place in a state and any place outside of that state, and commerce between places within the same state but through any place outside of that state.
>
> If you find beyond a reasonable doubt that Saso's Lounge was a tavern engaged in the retail sale of alcoholic beverages shortly before April 15, 1975, and if you further find beyond a reasonable doubt that some of the alcoholic beverages sold by Saso's Lounge had previously been purchased outside the State of Illinois by the distributor who sold to Mr. Saso, then I instruct you as a matter of law that the building housing Saso's Lounge and the personal property therein were being used "in an activity affecting interstate and foreign commerce" as defined in Section 844(i) of Title 18, United States Code.

The two instructions approach the problem differently. In *Hyde,* a more complicated case, no effort was made to enumerate in the instruction the interstate commerce facts first needed to be found by the jury before the court's finding as to jurisdiction was applicable, as was done in the present case. *Hyde* notes without disapproval that a number of courts have approved the approach used by the trial judge here when the facts supporting the interstate commerce aspect of the case were fairly simple, citing as an example *Hulahan* v. *United States,* 214 F.2d 441 (8th Cir. 1954), *cert. denied,* 348 U.S. 856. We believe the more specific instruction used here has merit, particularly in a simple case, as it helps the jury focus upon the necessary facts giving rise to jurisdiction and eliminates any possible confusion. The "if believed" phrase inserted in the *Hyde* instruction was not used in the instruction in this case. That phrase is not needed as the court instructed the jury that an effect on interstate commerce would exist as a matter of law only if the jury first found the specific commerce facts to have been established beyond a reasonable doubt. The court's other instructions informed the jury that its function is to determine the facts and that the jury alone is the sole and exclusive judge of the facts. We find no error in the instruction.

III.

The defendants next contend that the Government failed, in violation of the requirements of *Brady*[6] as interpreted in *United States* v. *Agurs,* ..... U.S. ....., 96 S.Ct. 2392 (1976), to produce the exculpatory statement of a witness named McConahay who testified for defendant Sweet and for the Government on rebuttal. The ma-

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[6] *Brady* v. *Maryland,* 373 U.S. 83 (1963).

terial was made available to the trial court for *in camera* inspection and then sealed by the court after reaffirming the Government's position. Both parties assumed in their briefs that this sealed material was part of the record and available on appeal for inspection. It was not, but has been made a supplement to the record by order of this court, and was thereafter examined.

This material consists of two statements of the witness and one Report of Interview by a Special Agent, together with what appear to be the Agent's original notes of the interview. The statements are generally the same, but vary in some respect with more details on certain aspects. The motion for these statements was made under *Brady,* but not renewed as a Title 18, § 3500 motion when the witness was called by the Government. It is not clear, but it appears from the transcript that at various times during the examination or cross-examination of the witness these statements may have been used in court and made available to defense counsel. The witness was called by the defense and later by the Government in rebuttal and subjected to both direct and cross-examination by all parties. The matters contained in the sealed documents were thoroughly explored. The witness had been previously interviewed by the defense and its investigator. McConahay can hardly be classified as a witness unsympathetic to the defense as he testified that he rode to court with Defendant Sweet wearing one of his neckties.

We find nothing exculpatory in the statements and no error in their nonproduction under these circumstances.

IV.

The defendant Sweet in his defense offered the testimony of a polygraph examiner which the court in its discretion refused to receive. The defense recognizes

that this court has previously held the admissibility of polygraph testimony to be within the discretion of the trial judge,[7] but argues that the court's discretion was abused in this case. Nor are other circuits willing to embrace such testimony. *United States* v. *Alexander,* 526 F.2d 161 (8th Cir. 1975).

We find no abuse of discretion.

V.

Next the defense claims that the Government breached an agreement not to call a witness named Kreml to whom, the Government claimed, the defendant Hogan had made inculpatory statements. The Government, after about a day's advance notice at which time the Jencks statement was provided to the defense, called Kreml over the objection of the defendants. We find nothing in the record to substantiate an agreement binding on the Government as was the situation in *United States* v. *Scanland,* 495 F.2d 1104 (5th Cir. 1974), relied upon by defendants. In that case there was a pretrial agreement recorded in an Omnibus Hearing Report signed by all counsel. Even under those circumstances that court expressly refused to diminish the sound discretion of the trial judge to grant releases from such agreements upon reasonable notice.

We find no abuse of the trial judge's discretion.

VI.

The defense claims that it was error not to grant a motion for mistrial when a Government witness during

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[7] *United States* v. *Chastain,* 435 F.2d 686 (7th Cir. 1970); *United States* v. *Infelice,* 506 F.2d 1358 (7th Cir. 1974), *cert. denied,* 419 U.S. 1107.

direct examination made reference to defendant Hollowell's prior record. In response to a question as to what the defendant Hollowell had said to him about the firebombing, the witness responded:

> He asked me that—he heard that I was going to tell the cops what happened. I told him that—he also told me—he said that anyone that attempted—he said his life had been messed up once by a prison term. He said that if anybody tried to send him up again, or testify against him on anything he had done, he would kill them.

It appears that this was a reference to a prior juvenile offense. The trial court thereafter instructed the jury that the witness' statement "made with respect to any prior prison term by the defendant Hollowell was incorrect. He was misinformed. Therefore, you should not consider that. It has been stricken from the record. It is something that doesn't exist as far as this case is concerned." As a rationale for this instruction the court reasoned that since the offense alluded to was a juvenile offense and could not be used in the trial for any purpose, the court thus would not be misleading the jury by using the form of the instruction given. That may be, but we recommend, when required, that a straightforward instruction to disregard be given, incorporating therein nothing beyond the facts. Such an instruction as suggested may not always be as effective as the one given in this case, but it will eliminate the possibility that the jury may have cause to believe that the judge, even though well intentioned, misled them. There is no reason to believe that the jury did not follow the instruction. The matter was not again alluded to during trial. Incorporated in the trial judge's final instruction to the jury was the further admonition that the defendants were not on trial for any act or conduct not alleged in the indictment and that testimony which the court had ordered stricken from the record did not constitute evidence and was not to be considered by the jury.

We find no prejudice to the defendants after the court's instruction and no error.

We affirm.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
February 16, 1977.

Before
Hon. Thomas E. Fairchild, Chief Judge
Hon. Latham Castle, Sr. Circuit Judge
Hon. Harlington Wood, Jr., Circuit Judge

UNITED STATES OF AMERICA

Plaintiff-Appellee

Nos. 76-1366, 76-1379, 76-1387 vs.

JOHN L. SWEET, HENRY D. HOLLOWELL and JAMES C. HOGAN

Defendants-Appellants

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division

No. 75 CR 529
Thomas R. McMillen, Judge

ORDER

On consideration of the petition for rehearing, all of the members of the panel having voted to deny a rehearing,

IT IS ORDERED, that the petition for a rehearing in the above-entitled cause be, and the same is hereby DENIED.